



Revenue Interim Committee

67th Montana Legislature

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TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 30, 2021

Rulemaking and Powers of Rule Review Committees and Individual Members

1. General concepts:

- a. What is a rule? The [Montana Administrative Procedure Act](#) (MAPA) defines it as an agency regulation, standard, or statement that implements, interprets, or prescribes law or policy. Most agency rules have the force and effect of law.
- b. Where are Montana's rules located? The Administrative Rules of Montana (ARMs) are the administrative rules in their entirety. They are updated by the [Montana Administrative Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes. The ARMs are also published to the Internet at <http://www.mtrules.org/>.
- c. Why are rules adopted?
 - (1) To "fill in gaps" left by legislation and provide the public with certainty as to what is required.
 - (2) To allow the public input into what the rules will be.

2. Citations to statutes concerning rulemaking:

- a. Montana Administrative Procedure Act (MAPA), [Title 2, chapter 4](#), MCA.
- b. Section [5-5-215](#), MCA -- interim committee powers generally.
- c. Section [5-5-227](#), MCA -- specific rulemaking review authority of Revenue and Interim Committee.

- 2021 Legislation: The 2021 Legislature enacted [House Bill 701](#) to revise provisions of the adult-use and medical marijuana programs, including moving administration of the medical marijuana program to the Department of Revenue. The bill amends [16-12-110](#) and [16-12-210](#) to require the Economic Affairs Interim Committee (EAIC) to monitor both marijuana programs beginning Jan. 1, 2022.
 - 2019 Legislation: Senate Bill No. 226 split the former Revenue and Transportation Interim Committee into the Revenue Interim Committee and the Transportation Interim Committee. Consequently, the unlike the former Revenue and Transportation Interim Committee, the Revenue Interim Committee does not review Montana Department of Transportation rules.
 - 2017 Legislation: House Bill No. 16 reassigned administrative rule review functions regarding administration of the Montana Alcoholic Beverage Code to the Economic EAIC. Consequently, the Revenue Interim Committee does not review Department of Revenue administrative rules that pertain to this subject area.
- d. Section [5-11-106](#), MCA -- interim committee investigatory powers generally.
- e. Section [2-4-102](#), MCA -- "rule" is adoption of an entire rule, an amendment to a rule, or a repeal of a rule.

3. **Rulemaking generally:**

- a. Rule adoption system -- governs procedure only; generally, MAPA is not authority to adopt rules ([2-4-301](#), MCA).
- b. MAPA is the procedure most used by agencies to adopt rules. Some agencies are exempted completely from MAPA; a few agencies have a different statutory system for rule adoption.
- c. Authority to adopt most rules must be express and not implied authority ([2-4-305](#), MCA).
- d. Two notices must be published in the Montana Administrative Register (MAR): proposal notice and adoption notice. The notice format is specified by the Secretary of State's rules ([2-4-306](#), MCA). At the time the proposal notice is sent for preparation for publication to the Secretary of State for publication in the register, the agency must concurrently send the proposal notice to each member of the staff of the appropriate rule review committee ([Ch. 519, L. 2021](#)).
- e. Hearing on rule proposal required in some instances, but an agency can voluntarily hold a hearing ([2-4-302](#), MCA):
- (1) matter of significant interest to public.
 - (2) request by a rule review committee.
 - (3) request by minimum of 25, or 10%, of those affected by proposed rule.
 - (4) request by association.
 - (5) request by agency or governmental subdivision.
- f. Time periods ([2-4-302](#), MCA):
- (1) minimum 30 days' notice before agency action.
 - (2) minimum 20 days' notice of public hearing (if held).
 - (3) minimum 28 days to submit comments.

- (4) total minimum time for rule adoption is 30 days' notice, plus approximately 2 weeks to publish adoption notice. This includes:
 - a. time period for hearing and written comments; or
 - b. time for written comment alone if no hearing.
 - (5) 6-month maximum for adoption and publication ([2-4-302](#) and [2-4-305](#), MCA).
 - (6) emergency rules exception ([2-4-303](#), MCA) -- notice to committee required ([Ch. 199, L. 2021](#)).
 - (7) rules cannot be adopted between October 1 and the end of the year in the year preceding the year in which the Legislature meets in regular session -- exceptions ([Ch. 519, L. 2021](#)).
- g. Minimum requirements for content of notice of proposed rulemaking ([2-4-305](#), MCA):
 - (1) agency must have and cite in the proposal notice express statutory authority for rules (usually not in MAPA, per above).
 - (2) agency must have and cite statute being implemented by proposed rule, which sometimes is the same as authority, though frequently different.
 - (3) agency must state rationale or statement of "reasonable necessity" for proposed rule.
 - (4) foregoing three requirements are where most agency errors occur in the rulemaking process.
 - h. Committee work starts with committee staff review, on committee's behalf, for those three items in paragraph 3g above. Committee review is mandatory in accordance with [2-4-402\(1\)](#), MCA.
 - (1) Problems with a proposed rule will be brought to committee for resolution only if staff can't resolve the issue with the agency.
 - (2) All proposals will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants. Adoptions will be noted on the committee website.
 - i. After a rule is adopted through publication in the MAR, the rule is published in the Administrative Rules of Montana.

4. Committee powers:

- a. Mostly in MAPA -- some in other statutes ([5-5-215](#) and [5-11-107](#), MCA, mentioned earlier).
- b. Tiebreaking votes -- the Speaker of the House and the President of the Senate are *ex officio* voting members of each administrative rule review committee for the sole purpose of breaking a tie vote on a question before a committee involving an objection to an administrative rule ([Ch. 102, L. 2021](#)).
- c. Committee powers:
 - (1) request and obtain agency rulemaking record for review ([2-4-402](#), MCA).
 - (2) recommend to the appropriate agency adoption, amendment, rejection, or repeal of any rule ([2-4-402](#), [2-4-411](#), and [2-4-412](#), MCA).
 - (3) request rulemaking hearing be held ([2-4-402](#), MCA).
 - (4) bring or participate in litigation involving MAPA ([2-4-402](#), MCA).
 - (5) review "incidence and conduct" of proceedings under MAPA ([2-4-402](#), MCA).

- (6) object to proposed rules (may object to all or a portion of a notice of proposed rulemaking) in order to delay adoption of the rule by an agency ([2-4-305](#)(9), MCA).
- (7) submit oral or written comments to agency rulemaking record ([2-4-402](#), MCA).
- (8) conduct poll of Legislature to see if rules follow legislative intent:
 - a. discretionary poll or mandatory poll ([2-4-403](#), MCA).
 - b. effect of poll ([2-4-404](#), MCA).
 - c. publication of results of poll ([2-4-306](#), MCA).
- (9) request or have prepared an economic impact statement regarding a proposed rule ([2-4-405](#), MCA).
- (10) object to a proposed rule for purposes of shifting the burden of showing legality of adoption ([2-4-306](#) and [2-4-406](#), MCA.)
- (11) hold hearings and conduct investigations involving agency compliance with MAPA and other statutes ([5-11-107](#), MCA).
- (12) recommend amendments to MAPA or other state laws ([2-4-411](#), MCA).
- (13) request publication of material adopted by reference in a rule ([2-4-307](#), MCA).
- (14) request publication of statement on adjective or interpretive rules ([2-4-308](#), MCA).
- (15) request and receive copies of documents in litigation involving judicial construction of rule or MAPA ([2-4-410](#), MCA).
- (16) monitor operations of agency within committee's jurisdiction ([5-5-215](#), MCA).

5. Powers of individual members of committee or Legislature:

- a. As member of Legislature, petition for adoption, amendment, or repeal of a rule ([2-4-315](#), MCA).
- b. As primary sponsor, receive notice from agency, before it writes a rule, of its intent to write the rule. The manner and date of notice to the primary sponsor must be stated in the notice of proposed rulemaking ([2-4-302](#), MCA).
- c. Request agency to form informal conference or committee to develop proposed rule before agency publishes notice ([2-4-304](#), MCA).
- d. Join agency's list of interested persons for purposes of rulemaking ([2-4-302](#), MCA).
- e. Contribute to agency rulemaking record ([2-4-302](#) and [2-4-305](#), MCA) by:
 - (1) writing or e-mailing agency, as provided in agency's proposal notice, before the rulemaking record closes.
 - (2) testifying at any agency rulemaking hearing.
- f. Object to committee presiding officer regarding proposed rule in order to potentially delay adoption of rule so committee can review proposed rule ([2-4-305](#)(9), MCA). If a majority of the committee notifies the presiding officer of the objection, then the committee notifies the agency in writing of the objection and the agency must delay adoption of the proposal notice.
- g. Request, by motion, that interim committee take any of those actions authorized by law for committee to take (see 4c earlier).

Department of Revenue

Proposal and Adoption Notices are available on the Internet:

Department of Revenue notices can be found on the Secretary of State's website at <http://www.mtrules.org> . Under the Montana Administrative Register heading, type the number "42" in the "Search by Notice No." box and click on the "Go" icon.

Notice of Transfer:

Montana Medical Marijuana Program -- [House Bill 701](#). [MAR 42-1030](#). Effective July 2, 2021. The Department of Public Health and Human Services transferred 27 rules to the Department of Revenue. The transfer was required because [House Bill 701](#) from the 2021 Legislature transferred the administrative function and responsibilities for the operation of the Montana Medical Marijuana Program from the Department of Public Health and Human Services to the Department of Revenue.